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80-733

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO, *Petitioner,*

v.

BEN CARTER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Was the remand order of the district court issued after entry of judgment on the jury verdict but prior to disposition of a seasonably-filed motion for a new trial or, in the alternative, for judgment notwithstanding the verdict unreviewable on mandamus pursuant to 28 USC 1447(c) and (d)?

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No. _____

IN RE BEN CARTER, *Petitioner,*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the writ of mandamus granted by a panel of the United States Court of Appeals for the Fifth Circuit in the above-entitled case on May 30, 1980.

CITATION TO THE OPINIONS BELOW

The order of Judge Alaimo setting aside the jury verdict and remanding the case to the Superior Court of Richmond County, Georgia, is unreported. It appears in Appendix A, infra. The opinion of the panel appears in Appendix B and is reported at 618 F.2d 1093. The order of the panel denying Petitioner's motion for reconsideration and suggestion for reconsideration en banc is unreported and appears in Appendix C.

JURISDICTION

The writ of mandamus was granted by the panel on May 30, 1980. Petitioner's motion for reconsideration and suggestion for reconsideration en banc was denied on August 13, 1980. This Court has jurisdiction to review the judgment by writ of certiorari under 28 USC 1254(1).

STATUTES INVOLVED

28 U.S.C. 1447(c)

"If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case."

28 U.S.C. 1447(d)

"An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."

STATEMENT OF THE CASE

The complaint alleging in broad, conclusory language a conspiracy to deny Respondent, Ben Carter, certain union membership and employment rights was filed originally in the Superior Court of Richmond County, Georgia, where it was tried to a jury which

returned a verdict in his favor. The judgment entered on the verdict was set aside on appeal by the Supreme Court of Georgia on the ground that Petitioner, Sheet Metal Workers' International Association, AFL-CIO, had not properly been served with process. Petitioner was served with process in the manner provided under state (Georgia) law thereafter and the original action was reinstituted.

Petitioner then removed the case to the federal court on alleged federal grounds which Respondent never challenged. Prior to the time the case was ready for trial, however, Respondent made clear that his action was based solely on a non-federal conspiracy theory, and it was so tried before a jury. The federal-court jury returned a verdict on the state-law tort claims in favor of Respondent in the amount of $35,000.00 actual damages; $110,000.00 punitive damages; and $5,280.00 attorney fees. Judgment thereon was entered May 25, 1979.

Petitioner filed a timely motion for a new trial or, in the alternative, for judgment notwithstanding the verdict[1] and also a suggestion that the court dismiss the complaint pursuant to Rule 12(h)(3) on the ground of lack of subject-matter jurisdiction and remand the case to the Superior Court of Richmond County, Georgia, for appropriate proceedings thereon.[2] The district court after taking the motion and suggestion under advisement issued an order on December 6, 1979, granting Petitioner's motion to set aside the verdict and judgment on the ground of lack of subject-matter jurisdiction and remanding the case to the State court.

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[1] A true copy of this motion is reporduced in App. D.

[2] A true copy of the suggestion is reporduced in App. E.

Judge Alaimo recognized the almost certain finality and non-appealability of his remand order pursuant to 28 USC 1447(d). *Thermtron products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976). However, in order to give Respondent an opportunity to ascertain whether "another exception" to the prohibition of remand-order review would or could be implied by the appellate court, he stayed the December 6, 1979, order to permit Respondent to institute an interlocutory appeal under 28 USC 1292, to be instituted within ten days after entry of his order, i.e., by December 16, 1979. The order stated in pertinent part:

> "The Order of remand is stayed pending appeal of this order as provided in 28 USC §1292(b). In the absence of such appeal, the stay shall be dissolved *instanter*."

Appeal was not initiated by Respondent under 28 USC 1292 within the ten day period provided thereunder; whereupon the stay of the remand order was dissolved by its own terms on December 16, 1979. No further appellate action was attempted until January 7, 1980, on which date Respondent filed the within Petition for Writ of Prohibition and/or Writ of Mandate.

A panel of the Court of Appeals, on January 18, 1980, over a month after the district court's stay of execution had been dissolved *instanter*, entertained Respondent's Petition and entered an order continuing in effect "pending appeal" the stay of execution of the December 6, 1979, order which, in actuality, had long since been dissolved by its own terms. Then, on May 30, 1980, the panel granted Respondent's writ of mandamus and, *inter alia*, returned the case to the district court with instructions to reconsider the question whether Respondent's non-federal claims were justiciable under its pendent jurisdiction.

The appellate court's rationalization for review was that Judge Alaimo's order was issued *after* final judgment. The panel held that appellate review was foreclosed pursuant to 28 USC 1447(c) and (d) only when the remand order was issued *before* final judgment, and that the motion for a new trial or, in the alternative, for judgment notwithstanding the verdict did not stay or otherwise impair the finality of the judgment within the meaning of the statute.

Petitioner filed a timely motion for reconsideration and suggestion for reconsideration en banc which was denied by the panel on August 13, 1980. The entire court was polled at the request of one of the members thereof, but a majority of the circuit judges who are in regular active service did not vote for a rehearing en banc.

REASONS FOR GRANTING THE WRIT

The Court Of Appeals Has Decided An Important Federal Question In A Way In Conflict With Applicable Decisions Of This Court

The panel decision is at war with the settled interpretation of 28 USC §§1447(c) and (d) as enunciated by this Court in *Thermtron Products, Inc.*, v. *Hermansdorfer*, 423 U.S. 336 (1976). There the Court said:

> "There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, United States v. Rice, 327 U.S. 742, 757 (1946), Congress immunized from all forms of appellate review any remand order issued on the grounds specified in §1447(c), whether or not that order might be deemed erroneous by an appellate court."

The district court below remanded the case to the state court on the precise statutory ground set our in §1447(c),

i.e., that it was removed improvidently and without jurisdiction. This, the Court in *Thermtron* stated, meant that the remand order was "not reviewable on appeal or otherwise." 28 USC 1447(d). Notwithstanding this, the panel held that *Thermtron* was not controlling and that the remand order was reviewable because it was issued after entry of judgment on the jury verdict. The timely filed motion for a new trial or, in the alternative, for judgment notwithstanding the verdict was held to be insignificant for purposes of 28 USC 1447(c) and (d).

It is respectfully submitted that here, as in *Gravitt* v. *Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977), a panel of the Fifth Circuit is unwilling to accept and apply *Thermtron* in its full sweep. The panel's hypothesization in footnote 6 to its opinion that the congressional concern underlying 28 USC 1447(c) was only "to allow remand for a full trial" and its inference that Congress, therefore, did not disfavor appeal of remand orders after a "full trial" in a federal court has occured is unacceptable in view of the express language of the statutes involved, their legislative history, and this Court's holding in *Thermtron*.[3] Moreover, a "full trial"

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[3] The full text of footnote 6 is as follows:

"In arguing that the order is not reviewable, the International contends that its timely motions for judgment n.o.v. and new trial stayed the finality of the judgment. These motions are not included in the record before us. Nevertheless, we are of the opinion that considerations 'staying' the time for filing an appeal because of pending motions are not relevant to when a judgment is 'final' under §1447(c). As noted above, the congressional policy was to allow remand for a full trial. Because a full trial has occurred at the time motions for judgment n.o.v. and for new trial are filed, these policies are not thwarted by reviewing remand orders made after entry of final judgment but before decision on such motions. A rule such as the International proposes would only encourage unscrupulous litigants to cause the expenditure of federal judicial resources and then make their post trial motions after

exception to *Thermtron* would be illogical. The case will be tried in the state court after remand; therefore, remand has no adverse effect on a plaintiff's right to a "full trial". Cases in which more than one "full trial" takes place are commonplace in our judicial system, i.e., such as after a motion for a new trial has been granted. There is no judicial aversion to a multiplicity of "full trials" when necessary or proper.

The panel's premise that a "full trial" in the federal court creates another exception to the non-reviewability rule is, accordingly, invalid. In *Thermtron* Judge Hermansdorfer remanded a case to avoid congestion of his heavy trial docket. As this Court held therein, a remand for purposes of promoting judicial economy or efficiency, however laudable that objective may be, is not based on Section 1447(c) grounds and, hence, is reviewable on appeal. But a remand expressly based on statutory grounds, such as Judge Alaimo's herein, is, under Section 1447(d), "not reviewable on appeal or otherwise. . . ."

Even if a "final-judgment" exception to the non-reviewability rule were to be judicially created, such an

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final judgment to raise the nonwaivable jurisdictional questions forcing remand only if the outcome is unfavorable. Litigants with valid arguments are not left remediless: questions of subject matter jurisdiction can be raised at any time, even on appeal. But after one full trial, and in this case two, a litigant cannot use the remand apparatus to force expenditure of their opponents' and the state courts' resources before review by an appellate court. Our decision in *Live and Let Live, Inc.* v. *Carlsberg Mobile Home Properties, Lt.* — '73, 592 F.2d 846 (5th Cir. 1979) is not to the contrary. In that case the district court expressly made the entry of judgment on the verdict subject to decision of the unresolved diversity question, which had been raised before trial. As stated there, finality must be determined from the circumstances. *Id* at 848. We find that the *Carter* judgment was final." 618 F.2d at 1099-1100, Appendix A, p. 10a, 11a.

exception would not be applicable in these circumstances because the judgment entered on the jury verdict was not "final" at the time Judge Alaimo issued his remand order. A judgment is not final under the Federal Rules of Civil Procedure for most purposes, including appealability, until a motion for judgment notwithstanding the verdict or for a new trial, if timely filed, is overruled. *Browder* v. *Department of Corrections of Illinois*, 434 U.S. 257, 267 (1978). There, the court said:

> "Since the order of October 21 was final order, the time for appeal commenced to run on that date. Respondent's notice of appeal therfore was untimely by 68 days, unless respondent's motion of November 18 tolled the time for appeal under Rule 4(a). The rationale behind the tolling principle of the Rule is the same as in traditional practice: 'A *timely* petition for rehearing tolls the running of the [appeal] period because *it operates to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties*'. Department of Banking v. Pink, 317 U.S. 264, 266, 63 S. Ct. 233, 234, 87 L. Ed. 254 (1942)." (First emphasis the Court's).

No basis was cited by the panel as support for its inference that Congress, in enacting 28 U.S.C. §1447(c) and providing that the district court *shall* remand any case in which at any time "before final judgment" it appears (to the district court) that the case "was removed improvidently and without jurisdiction", did not use the term "final judgment" in the sense of appellate finality. It was pure *ipse dixit*. The inference that the "finality" referred to was appellate finality would seem well warranted because Congress definitely conferred on district courts broad authority to remand after trial but prior to appeal. Cf. *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

Congress in enacting 28 USC 1447(c) and (d) placed a high priority on the right of state courts to try non-federal claims that should have been litigated there in the first place. Adjudication of non-removable cases was to be avoided even at the risk that the federal district court might be mistaken in its evaluation of federal jurisdiction, or the lack of it. Thus, where a district court later felt that a case had been improperly remanded, it lacked jurisdiction to vacate its original order of remand. *Three J Farms, Inc.* v. *Alton Box Board Co.*, 609 F. 2d 112 (4th Cir. 1979). See also: *Gravitt* v. *Southwestern Bell Telephone Co.*, supra.

Thermtron held that a paramount congressional interest in enacting 28 USC 1447(c) and (d) was that the trial of a remanded case in the state court not be delayed "by protracted litigation of jurisdictional issues". Delay of the state-court trial *for precisely this reason* has already occurred as a result of the granting of the writ of mandamus herein. The decision of the panel, moreover, will raise questions and cause confusion as to the extent of non-reviewability of remand orders predicated on the statutory ground that "the case was removed improvidently and without jurisdiction". The error should be corrected by reversal of the decision of the panel below and affirmation of the non-reviewability of Judge Alaimo's order remanding the case to the state court for lack of subject-matter jurisdiction.

CONCLUSION

The Court should grant the petition for writ of certiorari for the reasons stated and resolve this important issue of federal procedure.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

BEN CARTER,

Plaintiff,

vs.

SHEETMETAL WORKERS INTERNATIONAL ASSOCIATION AND LOCAL 85 SHEETMETAL WORKERS INTERNATIONAL ASSOCIATION,

Defendant.

Civil Action No. CV 178-113

Filed December 6, 1974

ORDER

Ben Carter, a Georgian, sued the Sheetmetal Workers International Association (Union) in the Superior Court of Richmond County, Georgia. A verdict in his favor was reversed by the Supreme Court of Georgia for improper service of his complaint. Upon remand, he perfected service on the Union, whereupon the latter removed the case to this Court. At pre-trial, it clearly developed that the *only* claim plaintiff had was a state law claim for the intentional infliction of emotional distress by "outrageous conduct." *See Farmer* v. *Carpenters*, 430 U.S. 290, 51 L.Ed. 2d 338 (1977).

A trial by jury resulted in a verdict for Carter in the amount of $34,000 actual damages and $110,000 in punitive damages.

The Union has, *inter alia*, moved to set aside the verdict and judgment and remand the case to the State Court because of lack of diversity of citizenship, and, hence, lack of subject matter jurisdiction.

With great reluctance, the Court is constrained to agree with defendant.

II.

It is clear that this Court's jurisdiction of the subject matter stems *solely* from 28 U.S.C. §1332. However, it is clear, too, that none existed in this case. Plaintiff is of Georgia citizenship. He is a member of the defendant Union. The latter has members in all fifty states. The citizenship of an unincorporated labor union, for purposes of Federal diversity jurisdiction, is that of each of its members. *United Steel Workers of America* v. *Bouligny*, 382 U.S. 145, 15 L.Ed. 2d 217 (1965). Hence, absent diversity, this Court lacks jurisdiction.

The Court regrets this result because it appears to "encourage litigants to wager on their success on the merits, and if they lost, permit them to call the contest a nullity." *Murphy* v. *Kodz*, 351 F.2d 163, 168 (9th Cir. 1965).

At first blush, it would appear that the Union, having removed the action, should be estopped from raising the objection, particularly at this late date in the game. However, "(n)otions of waiver and estoppel cannot confer on a court of the United States the jurisdiction to decide a claim." *Amco Construction Co.* v. *Mississippi State Building Commission*, 602 F.2d 730, 733 (5th Cir. 1979). *And see Owen Equipment Erection Co.* v. *Kroger*, 437 U.S. 365, 377, n.21 (1978) *citing Americam Fire and Casualty Co.* v. *Finn*, 341 U.S. 6 (1951).

"Congress has established the basic rule that diversity jurisdiction exists under 28 U.S.C. §1332 only when there is complete diversity. 'The policy of the statute calls for its strict construction.' *Healy* v. *Ratta*, 292 U.S. 263, 270." *Owen Equipment & Erection Co.* v. *Kroger*, *supra*, 437 U.S. at 377.

Having no jurisdiction over the subject matter, this Court had no power to do anything save remand the action, *sua sponte*, to the State Court.

Accordingly, the verdict[1] and judgment are reluctantly set aside, and the case is remanded to the Superior Court of Richmond County, Georgia

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[1] Moreover, it is doubtful, under the record, that the verdict for punitive damages could be sustained. *See Electrical Workers* v. *Foust*, _____ U.S. _____, 60 L.Ed. 2d, 698, 707 (1979).

Notwithstanding 28 U.S.C. §1447 (d), this Court hopes this Order is appealable.[2] Perhaps another exception may be carved out of the statute. *Compare Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 46 L.Ed. 542 (1976).

Accordingly, pursuant to 28 U.S.C. §1292(b), this district judge is of the opinion that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion that an immediate appeal from this Order may materially advance the ultimate termination of this litigation.

The Order of remand is stayed pending appeal of this Order as provided in 28 U.S.C. §1292(b). In the absence of such appeal, the stay shall be dissolved *instanter*.

So Ordered, this 6th day of December, 1979.

/s/ ANTHONY A. ALAIMO
Chief Judge
United States District Court
Southern District of Georgia

[2] Despite my belief as incorporated in this Order, I was tempted to deny the remand and the other post-judgment motions in order to ensure a review. Intellectual honesty, however, forbids such an exercise.

APPENDIX B

In re Ben CARTER, Petitioner.

No. 80-7010

Summary Calendar.

United States Court of Appeals, Fifth Circuit.

May 30, 1980

On Petition for Writ of Mandamus and/or Prohibition to the United States District Court for the Southern District of Georgia.

Before AINSWORTH, FAY and RANDALL, Circuit Judges.

FAY and RANDALL, Circuit Judges:

In ruling on this petition for a writ of mandamus we must first answer the threshold question whether the bar to appellate review of a district court order remanding a case to a state court, which is found in 28 U.S.C. §1447(d),[1] applies to a remand order entered upon a ground specified in 28 U.S.C. §1447(c)[2] but issued after entry of final judgment in

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[1] 28 U.S.C. §1447(d) (1976) provides:

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

[2] 28 U.S.C. §1447(c) (1976) provides:

If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

the federal court. Finding that §1447(d) is no bar to appellate review in this case, we also review the propriety of the remand order entered by the district court and, disagreeing with the district court's disposition of the case, we grant the writ.

I. Procedural History

Ben Carter, a resident of Georgia, originally filed this action in 1972, in a Georgia state court against the Sheet Metal Workers' International Association [the International] and Local 85 of that labor organization. The complaint charges the representatives and members of the two organizations with a conspiracy to deprive Carter of his employment, to deny him his union membership, and to impair his reputation. The Local answered the complaint while the International did not, filing instead a motion to quash service and to dismiss the complaint because of improper service. That motion was denied and, because no answer to the complaint had been filed, a default judgment was entered against the International. Before trial, Carter dismissed the Local as a defendant, and therefore the state trial concerned only the issues of the amount of damages and attorney fees for which the Internaitonal was liable to Carter. The jury found the following damages and fees: $22,089 actual damages; $30,000 punitive damages; and $9,300 attorney fees.

This judgment was ultimately reversed by the Georgia Supreme Court on the ground that the International was not validly served with process. *Sheet Metal Workers' Inter. Ass'n* v. *Carter*, 241 Ga. 220, 244 S.E.2d 860 (1978). The action was reinstituted and proper service on the International made, whereupon the International removed the case to the federal court. The basis for removal as described in the International's Petition for Removal was that the general allegations of the complaint, particularly the assertions that "the defendants conspired together, maliciously and willfully, to deprive the plaintiff of his employment in the Sheet Metal Industry . . . [and] to deny plaintiff his right and privilege to be a member of defendants' union" appeared to allege claims aris-

ing under federal law. The International specifically mentioned three provisions of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§401, 402, 411 (1976), and one provision of the Labor Management Relations Act, 29 U.S.C. §185 (1976). Alternatively, the International argued that removal was proper because the case came within the original jurisdiction of the district court pursuant to 28 U.S.C. §1337 (1976).

The general allegations of the complaint asserted that the International and the Local had engaged in conduct that arguably might have formed the foundation of a federal cause of action. Understandably, however, Carter's Georgia pleading cited no federal statute and does not unambiguously raise a claim under federal law. Carter did not move to have the case remanded, and the court did not remand on its own motion. At a pretrial conference, Carter made it clear that he intended to press only a state-created tort claim. The federal court did not then remand the action. After trial, the jury returned a verdict in favor of Carter in the following amounts: $35,000 actual damages; $110,000 puntive damages; and $5,280 attorney fees. In accordance with the jury verdict, the district court entered a final judgment in the case on May 25, 1979.

After entry of final judgment the International, which had initially sought removal, moved to have the judgment vacated and the case remanded for lack of subject matter jurisdiction. Upon examining the question of jurisdiction, the district court regretfully concluded that it had not had jurisdiction to hear the case, vacated the judgment, and remanded the case to the Superior Court of Richmond County, Georgia. Carter then filed this petition for a Writ of Mandamus with this court seeking review of the remand order. Well aware of the prohibition of appellate review of remand orders contained in 28 U.S.C. §1447(d), and cognizant also of the limiting construction of that prohibition found in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976), we requested

additional briefs from the parties addressing the jurisdictional issues underlying the district court's action. Having considered the issues carefully, we now hold that the remand order, although entered upon a ground specified in §1447(c), is reviewable notwithstanding §1447(d) because it was entered outside of the time frame specified in §1447(c); and upon review of that remand order we determine that remand was improper. We therefore grant the aplication for a writ of mandamus.

II. Reviewability of the Remand Order

[1-3] In holding that all remand orders entered by federal district courts are not insulated from review by §1447(d), the Supreme Court in *Thermtron* emphasized that §1447(d) must be construed with reference to §1447(c). 423 U.S. at 345. The court said: "[O]nly remand orders issued under §1447(c) and invoking the grounds specified therein — that removal was improvident and without jurisdiciton — are immune from review under §1447(d)." *Id.* at 346, 96 S.Ct. at 590. The remand order in this case was explicitly based on a §1447(c) ground — lack of jurisdiction over the subject matter of the litigation. Section 1447(c) does not by its terms apply to all remand orders entered upon such a ground, however, but only to those entered "at any time before final judgment." Vacation of the final judgment of a federal court that was without jurisdiction to hear the case, and a subsequent remand order, are not provided for in §1447(c). Nevertheless, because federal courts are courts of limited jurisdiction, due regard for the constitutional allocation of powers between the state and federal systems requires a federal court scrupulously to confine itself to the jurisdiction conferred on it by Congress and permitted by the Constitution. Although §1447(c) will govern remand in most cases, in those cases to which that section does not expressly apply the omission of coverage does not suffice to vest a federal court with a power it would not otherwise have. Even after entry of final judgment, the constitutional balance of policies that underlies the Article III grant of judicial power impels the vacation of that judgment

and remand to the state court having jurisdiction when it is determined that the federal court was without power to act because of a lack of subject matter jurisdiction over a removed case. The action taken by the district court in this case, after it became aware that it had rendered a judgment when it was powerless to have done so, was precisely what the Supreme Court ordered done in *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951), when the Court determined that a federal court in this circuit had rendered judgment without federal subject matter jurisdiction of the removed case.[3] *See also Tennessee* v. *Union & Planters' Bank*, 152 U.S. 454, 14 S.Ct. 654, 38 L.Ed. 511 (1894).

Although the remand order in this case was not one explicitly covered by §1447(c), it nevertheless arguably ought to be immune from appellate review because it was entered upon a ground specified in that section. In analyzing the scope of §1447(d)'s prohibition of review of remand orders, the Court in *Thermtron* had occasion to deal only with a remand order prompted by the district court's congested docket, a consideration not found in §1447(c). Although the Supreme Court discussed in broad terms the necessity of construing subsections (c) and (d) *in pari materia*, it does not necessarily follow from the holding in *Thermtron* that every departure from the literal prescriptions governing remand in §1447(c) is

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[3] Neither party questions whether under §1447 a district court has any power to remand after final judgment. *Finn* does not address the issue but impliedly holds that the court does have this power. Because we find this remand order to be improper, we will not rule on this broader point. We do note, however, that prior versions of the statute allowed to remand "at any time." The addition of "before final judgment" may reflect a congressional intent to restrict the district court's power to enter these orders. If such a rule is announced we would hope that a district court's post final judgment disposition of a removed case for lack of jurisdiction would be in a manner that allows the plaintiff to refile without facing a statute of limitations defense.

sufficient to avoid the proscription of review contained in §1447(d). Because Congress has so firmly stated a general policy against appellate review of remand orders, we deem it advisable to consider the end sought to be achieved by that policy and the effect on that end of a holding that remand orders entered after final judgment are reviewable.

The policy underlying § 1447(d) identified by the court in *Thermtron* is the preclusion of delay in litigating the merits of a controversy that would attend appellate litigation of jurisdictional issues. 423 U.S. at 351, 96 S.Ct. at 593. In speaking of one of the predecessors of §1447(d)[4] that repealed an earlier provision[5] permitting review of remand orders in removed cases, the Court said:

> Congress . . . established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.

United States v. *Rice*, 327 U.S. 742, 751, 66 S.Ct. 835, 839, 90 L.Ed. 982 (1946).

The considerations of prompt and efficient judicial resolution of substantive controversies that inform a rule of nonreviewability of remand orders issued before final judgment in a removed case do not apply with the same force to remand ordrs issued subsequent to entry of final judgment in a removed case. Whereas before final judgment the nonreviewability of remand orders serves to ensure the expeditious resolution of the case in a court of competent jurisdiction — the court in which the action was originally filed — and to minimize the expenditure of scarce federal judicial resources at the appellate level, once a case has been fully tried in a federal court and a final judgment entered, the equation alters markedly. The risk of an erroneous determination — which, of course, inheres in all human pursuits — is

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[4] Act of March 3, 1887, c. 373, §2, 24 Stat. 553.

[5] Judiciary Act of 1875, c. 137, §5, 18 Stat. 472.

no greater after final judgment that before, and arguably is much less, since a district court may be expected punctiliously to assay claims of no jurisdiction before rendering an order that effectively reduces the value of its toil to naught. Deliberately subjecting the state court and the litigants to any risk of error without recourse to appellate review is a gamble, however, and the stakes in that gamble on the correctness of the district court's jurisdictional determination are much greater after a case has proceeded to judgment than before. Federal judicial resources, once expended upon the trial of a cause, obviously cannot be recouped by relitigation in a state court. An order of remand after entry of final judgment no longer fosters prompt resolution of the merits of the case, but serves instead only to delay final resolution by subjecting the litigants to a second, and the state court to a possibly duplicative, trial for the same matter. Extending the prohibition of review in §1447(d) to a remand order entered outside the time frame specified in §1447(c) therefore promotes not at all the congressional policy that is the foundation of §1447(d), and can only compound unnecessarily the undesirable consequences that ineluctably accompany any rule which makes a possible judicial error unreviewable.

[4,5] Our limitation of §1447(d) to orders entered within the time frame specified in §1447(c) is as consistent with judicial precedent as it is with congressional policy. We have already adverted to the Supreme Court's declaration, in holding that §1447(d) applies solely to remand orders entered upon grounds specified in §1447(c), that "only remand orders issued under §1447(c) *and* invoking the grounds specified therein . . . are immune from review under §1447(d)." *Thermtron,* 423 U.S. at 346, 96 S.Ct. at 590 (emphasis added). Because issued after the entry of final judgment,[6] the re-

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[6] In arguing that the order is not reviewable, the International contends that its timely motions for judgment n. o. v. and new trial stayed the finality of the judgment. These motions are not included in the record before us. Nevertheless, we are of the opinion that considerations "staying" the time for filing an appeal because of

mand order in this case was not, and could not have been, issued under the authority of §1447(c), and therefore review of that order, by writ of mandamus,[7] is not precluded by §1447(d). A remand order entered by a district court following entry of final judgment in a case is more closely akin to a remand of a removed case ordered by an appellate court than it is to a remand by the trial court before a final judgment has been rendered. Remands ordered by appellate courts returning removed cases to state courts have never been presumed to come within the bar of §1447(d) or its predecessors.[8]

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pending motions are not relevant to when a judgment is "final" under §1447(c). As noted above, the congressional policy was to allow remand for a full trial. Because a full trial has occurred at the time motions for judgment n. o. v. and for new trial are filed, these policies are not thrwarted by reviewing remand orders made after entry of final judgment but before decision on such motions. A rule such as the International proposes would only encourage unscrupulous litigants to cause the expenditure of federal judicial resources and then make their post trial motions after final judgment to raise the nonwaivable jurisdictional questions forcing remand only if the outcome is unfavorable. Litigants with valid arguments are not left remediless: questions of subject matter jurisdiction can be raised at any time, even on appeal. But after one full trial, and in this case two, a litigant cannot use the remand apparatus to force expenditure of their opponents' and the state courts' resources before review by an appellate court. Our decision in *Live and Let Live, Inc.* v. *Carlsberg Mobile Home Properties, Ltd.—'73*, 592 F.2d 846 (5th Cir. 1979) is not to the contrary. In that case the district court expressly made the entry of judgment on the verdict subject to decision on the unresolved diversity question, which had been raised before trial. As stated there, finality must be determined from the circumstances. *Id.* at 848. We find that the *Carter* judgment was final.

[7] *See Thermtron*, 423 U.S. at 352-53, 96 S.Ct. at 593-94.

[8] *See Willingham* v. *Morgan*, 395 U.S. 402, 404, 89 S.Ct. 1813, 1814, 23 L.Ed.2d 396 (1969); *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U.S. 464, 467, 67 S.Ct. 798, 800, 91 L.Ed. 1024 (1947); *Gay* v. *Ruff*, 292 U.S. 25, 30, 54 S.Ct. 608, 610, 78 L.Ed. 1099 (1934).

We therefore hold that an order of remand issued on whatever grounds by the district court after the entry of final judgment is reviewable in this court through a petition for a writ of mandamus. We now address the question whether remand was appropriate in this case.

III. Propriety of the Remand Order

[6,7] Although our notion of fair play is seriously offended when a party seeks removal of a case to a federal court, permits it to be tried and to proceed to judgment, and seeks a remand order only when the judgment turns out to be an unfavorable one, if the asserted ground for remand is the federal court's lack of subject matter jurisdiction, the concepts of equity, waiver, and estoppel are inapplicable. The subject matter jurisdiction of federal courts is limited by the Constitution and the Congress, and cannot be expanded by judicial interpretation or by the acts or consent of the parties to a case. *American Fire & Casualty Co.* v. *Finn,* 341 U.S. 6, 17-18, 71 S.Ct. 534, 541-542, 95 L.Ed. 702 (1951); *Amco Construction Co.* v. *Mississippi State Building Comm'n,* 602 F.2d 730, 733 (5th Cir. 1979).

[8] The district court noted in its remand order that the requirements for diversity jurisdiction were lacking because Carter was a citizen of Georgia and the union, having members of Georgia citizenship, was deemed to be a citizen of that state under *United Steelworkers of America* v. *R.H. Bouligny, Inc.*, 382 U.S. 145, 146-47, 86 S.Ct. 272, 273, 15 L.Ed.2d 217 (1967). Federal question jurisdiction therefore provides the only basis for removal of this case. The basic federal question statute is 28 U.S.C. §1441(b), which provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

For a case to "arise under" one of the stated sources of federal law, a right or immunity created by one of those sources "must be an element, and an essential one, of the plaintiff's cause of action. . . . [That] right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." *Gully* v. *First Nat'l Bank in Meridian,* 299 U.S. 109, 112, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936) (citations omitted). The federal controversy "must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." *Id.* at 113, 57 S.Ct. at 98; *see also Louisville & Nashville R. Co.* v. *Mottley,* 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908); *Tennessee* v. *Union & Planters' Bank,* 152 U.S. 454, 14 S.Ct. 654, 38 L.Ed.2d 511 (1894). On the other hand, the accepted rule in this circuit is that upon removal the removal court should inspect the complaint carefully to determine whether a federal claim is necessarily presented, even if the plaintiff has couched his pleading exclusively in terms of state law. *See Romick* v. *Bekin Van & Storage Co.,* 197 F.2d 369 (5th Cir. 1952). The reviewing court looks to the substance of the complaint, not the labels used in it. *See Smith* v. *Local 25, Sheet Metal Workers Int'l Ass'n,* 500 F.2d 741, 748-49 n.5 (5th Cir. 1974).

[9,10] In his order remanding the case, the district court stated. "At pretrial, it clearly developed that the *only* claim plaintiff had was a state law claim for the intentional infliction of emotional distress by 'outrageous conduct.' *See Farmer* v. *Carpenters,* 430 U.S. 290, [97 S.Ct. 1056], 51 L.Ed.2d 338 (1977)." (emphasis in the original). The court then concluded that because diversity of citizenship was absent, the court had no jurisdiction over this state law claim. The trial court erred by viewing the pleading in the wrong time frame. It is a fundamental principle of law that whether subject matter jurisdiction exists is a question answered by looking to the complaint as it existed at the time the petition for removal was filed. *Pullman Co.* v. *Jenkins,* 305 U.S. 534, 537-38, 59 S.Ct. 347, 348-49, 83 L.Ed. 334 (1939);

Westmoreland Hospital Ass'n v. *Blue Cross,* 605 F.2d 119, 123 (3d Cir. 1979). When a subsequent narrowing of the issues excludes all federal claims, whether a pendant state claim should be remanded to state court is a question of judicial discretion, not of subject matter jurisdiction. *Rosado* v. *Wyman,* 397 U.S. 397, 403-05, 90 S.Ct. 1207, 1213-15, 25 L.Ed.2d 442 (1970); *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *Hudak* v. *Economic Research Analysts, Inc.,* 499 F.2d 996, 1001 (5th Cir. 1974), *cert. denied,* 419 U.S. 1122, 95 S.Ct. 805, 42 L.Ed.2d 821 (1975); *Webb* v. *Bladen,* 480 F.2d 306, 309 (4th Cir. 1973). Indeed, it has often been stated that the plaintiff cannot rob the district court of subject matter jurisdiction by electing to amend away the grounds for federal jurisdiction. *E.g., St. Paul Mercury Indemnity Co.* v. *Red Cab Co.,* 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938). We therefore review first, whether a substantial federal question exists, and, if so, second, whether judicial discretion requires this remand in any event.

A. Federal Question Jurisdiction

The relevant portions of Carter's complaint follows:

> 2.
>
> Beginning in January of 1972, the defendants [Sheet Metal Workers International Association and Local 85 of Sheet Metal Workers' International Association] conspired together, maliciously and wilfully, to deprive the plaintiff of his employment in the Sheet Metal Industry and of his means of livelihood, to cause the plaintiff to be denied employment in this Industry, to deny the plaintiff his right and privilege to be a member of defendants' union, to impair the plaintiff's reputation among prospective employers, and to subject the plaintiff to embarrassment, scorn and derision among his friends, associates, relatives and fellow employees.

3.

In January of 1972, pursuant to, and in furtherance of, said conspiracy defendants' agents, officers and members, acting for and under the specific instructions of all defendants herein, maliciously, and without probable cause therefor, used the threat of union coercion and pressure to cause the plaintiff to be denied employment of a job in his industry for which he was ready, willing and able to perform.

4.

In March of 1972, pursuant to this same scheme and conspiracy these individuals coerced and forced an employer of the plaintiff to dismiss the plaintiff from a job in his industry which he then presently held.

Carter's complaint clearly alleges tortious conduct under Georgia law, as was established in another appeal during this protracted litigation. *Sheet Metal Workers Int'l Ass'n* v. *Carter,* 133 Ga. App. 872, 212 S.E.2d 645 (1975), *cert. denied,* 423 U.S. 1078, 96 S.Ct. 866, 47 L.Ed.2d 89 (1976). The question is whether it also alleges actions within the jurisdiction of the federal courts.

The International's removal petition, filed June 14, 1978, discloses its initial position that the allegations of Carter's complaint sufficiently pleaded a federal claim, as to which removal would be proper. Specifically, the International asserted that Carter's allegations that he had been denied employment in the sheet metal industry through some conduct by the International, and that he had been denied a right to be a member of that union were claims arising under the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§401, 402, and 411 and under the Labor Managbement Relations Act, 29 U.S.C. §§158, 159 or 29 U.S.C. §185.

1. LMRDA.—The Labor Management Reporting and Disclosure Act of 1959 (LMRDA), also known as the

Landrum-Griffith Act, "contains a congressional finding that there have been breaches of trust and failures in the observance of high standards of responsibility in the labor and management fields. The Act was passed for the purposes declared including the elimination of improper practices." *Clinton* v. *Hueston,* 308 F.2d 908, 910 (5th Cir. 1962). The "bill of rights" of the LMRDA is found at 29 U.S.C. §411 (1976). Presumably the International intended to rely on some provision in that section when, in its Petition for Removal, it said: "[T]he allegation of denial of membership falls squarely within the LMRDA, 29 U.S.C. §401, §402, §411." These sections guarantee members equal rights to nominate candidates, to vote, to attend meetings, to meet with other members, to express views, and to institute court actions. The sections also regulate the union's ability to increase dues, and to fine, suspend, expel, or "otherwise discipline" members.

[11,12] Whether Carter's allegations stated a claim under the LMRDA was a question without a clear answer at the time the petition for removal was filed. The LMRDA accords rights to every "member." That term is broader in scope than one might originally think in that Congress defined the term to include "any person who has fulfilled the requirements for membership in such organization." 29 U.S.C. §402(*o*) (1976). In *Hughes* v. *Local 11 of Int'l Ass'n of Bridge, Structural and Ornamental Ironworkers,* 287 F.2d 810 (3d Cir.), *cert. denied,* 368 U.S. 829, 82 S.Ct. 51, 7 L.Ed.2d 32, the Third Circuit held that a dismissal for lack of subject matter jurisdiction was improper once the plaintiff had alleged a substantial claim under the LMRDA. Whether the plaintiff actually was a "member" was a question of whether the complaint asserted a claim upon which relief could be granted, not a question of jurisdiction. *Id.* at 813-14. Several cases expressly or impliedly followed this lead. *Gavin* v. *Structural Iron Workers Local No. 1,* 553 F.2d 28 (7th Cir. 1977); *Parish* v. *Legion,* 450 F.2d 821 (9th Cir. 1971); *Sheridan* v. *United Bhd. of Carpenters,* 306 F.2d 152, 156 (3d Cir. 1962); *Addison* v. *Grand Lodge of Int'l Ass'n of Machinists,* 300 F.2d 863, 868

(9th Cir. 1962); *Vincent* v. *Plumbers & Steamfitters Local No. 198,* 384 F.Supp. 1379 (M.D. La.1974); *Axelrod* v. *Stoltz,* 264 F.Supp. 536 (E.D. Pa. 1967), *aff'd,* 391 F.2d 549 (3d Cir. 1968); *Cornelio* v. *Metropolitan District Council of Philadelphia,* 243 F.Supp. 126 (E.D.Pa. 1965), *aff'd,* 358 F.2d 728 (3d Cir. 1966), *cert. denied,* 386 U.S. 975, 87 S.Ct. 1167, 18 L.Ed.2d 134 (1967); *Ferger* v. *Local 483 of Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers,* 238 F.Supp. 1016 (D.N.J.1964), *aff'd,* 342 F.2d 430 (3d Cir. 1965). *See also Moynahan* v. *Pari-Mutuel Employees Guild of California,* 317 F.2d 209, 211, n.3 (9th Cir.), *cert. denied,* 375 U.S. 911, 84 S.Ct. 207, 11 L.Ed.2d 150 (1963). This distinction is clearly correct. The district court has jurisdiction if a complaint states a substantial federal claim, and the court can then assess the legal sufficiency of the complaint. *Levering & Garrigues Co.* v. *Morrin,* 289 U.S. 103, 105, 53 S.Ct. 549, 550, 77 L.Ed. 1062 (1933). A complaint's allegations are insubstantial if they are obviously without merit or if prior decisions foreclose controversy on the subject. *Id.* at 105, 53 S.Ct. at 550. *See also Romero* v. *International Terminal Operating Co.,* 358 U.S. 354, 359, 79 S.Ct. 468, 473, 3 L.Ed.2d 368 (1959); *Montana-Dakota Utilities Co.* v. *North-Western Public Service Co.,* 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 612 (1951); *Bell* v. *Hood,* 327 U.S. 678, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946).

As indicated above, the claim under the LMRDA was not obviously meritless. Some courts had indicated, however, that the LMRDA does not countenance a claim for wrongful denial of membership. *Abrams* v. *Carrier Corp.,* 434 F.2d 1234, 1254 (2d Cir. 1970), *cert. denied,* 401 U.S. 1009, 91 S.Ct. 1253, 28 L.Ed. 2d 545 (1971). *See also Gavin* v. *Structural Iron Workers Local No. 1,* 553 F.2d 28 (7th Cir. 1977); *Moynaham* v. *Pari-Mutuel Employees Guild of California,* 317 F.2d at 210; *MacKenzie* v. *Local 624, Int'l Union of Operating Engineers,* 472 F.Supp. 1025 (N.D.Miss.1979); *Vincent* v. *Plumbers & Steamfitters Local No. 198,* 409 F.Supp. 206 (M.D.La.1976). The cases distinguished situations such as

in *Hughes,* in which plaintiffs who were members of the national and one local attempted to transfer to another. *See Parish* v. *Legion,* 450 F.2d at 824. In *Hughes* the transferee local had not reserved the right to refuse membership. *See also Gavin* v. *Structural Iron Workers,* 553 F.2d at 30-31. If the local reserved that right, or required a vote for admittance, the plaintiff had not "fulfilled the requirements for membership," and was not a "member" eligible to sue under the LMRDA. *See Moynahan* v. *Pari-Mutuel Employees,* 317 F.2d at 210.

[13] Construing the complaint liberally, the allegations are sufficient to state a substantial federal claim under the LMRDA. The viability of an action for denial of membership was not such a settled question that the district court was deprived of subject matter jurisdiction, especially since the Supreme Court and this circuit have never ruled on the issue. Furthermore, the allegations in the complaint do not foreclose the possibility that Carter was attempting to transfer local membership or that the local had not reserved power to refuse membership.[9] In addition, the claim that the unions attempted to deny him employment in the industry arguably could be an allegation of improper disciplinary action. *See Keene* v. *International Union of Operating Engineers,* 569 F.2d 1375, 1379-81 (5th Cir. 1978) (blacklisting may be "other discipline" under 29 U.S.C. §411(a)(5)). The district court had jurisdiction over the LMRDA claim. Whether relief could have been granted is a separate question which we need not, and therefore will not, decide at this time.

[14] 2. LMRA Section 301.—The federal district courts have jurisdiction over suits for violations of contracts between an

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[9] Carter states in his Reply Memorandum that he actually was attempting to transfer membership from one local to another. This fact, however, is not clearly alleged in the complaint. *But cf. Villarreal* v. *Brown Express, Inc.* 529 F.2d 1219 (5th Cir. 1976) (in practice the courts consider the facts disclosed on the record as a whole).

employer and a labor organization under section 301(a) of the Labor Management Relations Act (LMRA), 29 U.S.C. §185(a)(1976). An employee can bring suit under section 301 against his union for breach of the collective contract when the breach is related to breach of the union's duty of fair representation. *Humphrey* v. *Moore,* 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964). *See Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America* v. *Lockridge,* 403 U.S. 274, 299, 91 S.Ct. 1909, 1924, 29 L.Ed.2d 473 (1971); *Vaca* v. *Sipes,* 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

[15,16] In its Petition for Removal, the International asserted: "One of the duties arising under section 301 is the Union's duty to fairly represent all employees coming under the protection of a collective bargaining agreement." Although the union does have this duty, a breach of the duty of fair representation is not always also a breach of the collective contract. *See Smith* v. *Local 25, Sheet Metal Workers Int'l Ass'n,* 500 F.2d 741, 745-46 (5th Cir. 1974). The duty of fair representation is an independent statutory duty that arises from the union's position as exclusive bargaining agent under sections 8 and 9 of the labor laws. *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 337, 73 S.Ct. 681, 685, 97 L.Ed. 1048 (1953). When the allegations assert a breach of the duty of fair representation without a corresponding breach of the collective contract, federal jurisdiction cannot be grounded on section 301.

Carter's complaint nowhere mentions the collective bargaining agreement. While mindful that the courts should construe duty of fair representation complaints to guard against their dismissal, *Czosek* v. *O'Mara,* 397 U.S. 25, 27, 90 S.Ct. 770, 772, 25 L.Ed.2d 21 (1970), in the absence of any mention of the collective bargaining contract we find it necessary to hold that there is no jurisdiction under section 301. *Cf. Smith* v. *Local 25, Sheet Metal Workers Int'l Ass'n,* 500 F.2d at 744, 745-46 (plaintiffs had not alleged violation of collective agreement; no section 301 suit based solely on duty of fair representation).

[17-19] 3. Sections 8 & 9.—A union has a duty to represent fairly all the employees in a bargaining unit because of the rights granted the union under sections 8(b) and 9(a) of the federal labor laws, 29 U.S.C. §§158(b), 159(a) (1976). *Vaca* v. *Sipes,* 386 U.S. at 177, 87 S.Ct. at 909; *Smith* v. *Local 25, Sheet Metal Workers Int'l Ass'n,* 500 F.2d at 746. These sections are part of an "Act of Congress regulating commerce" over which the district courts have original jurisdiction under 28 U.S.C. §1337 (1976).[10] *See Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees* v. *Lockridge,* 403 U.S. at 274, 91 S.Ct. at 1909; *Smith* v. *Local 25, Sheet Metal Workers Int'l Ass'n,* 500 F.2d at 748-49. Unlike plaintiffs under section 301, Carter need not be a member of the union to assert a duty of fair representation claim; the union's duty extends to all those in the unit. A union breaches its duty if its conduct reflects hostile discrimination based on irrelevant and invidious considerations. *Steele* v. *Louisville & Nashville R.R.,* 323 U.S. 192, 203, 65 S.Ct. 226, 232, 89 L.Ed. 173 (1944). "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca* v. *Sipes,* 386 U.S. at 190, 87 S.Ct. at 916 (1967).

[20] Carter's complaint clearly meets these standards. He alleges the unions discriminated against him without cause by maliciously conspiring to deprive him of employment in January of 1972, and by forcing an employer to dismiss him in March of 1972. The district court had federal question jurisdiction over the breach of the duty of fair representation claim.

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[10] 28 U.S.C. §1337 (1976) provides:

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

B. Pendent Jurisdiction

[21,22] Because the district court had jurisdiction over at least two federal questions in this suit, it also had the jurisdictional power to decide Carter's state law claims which arose from the same nucleus of operative fact. *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). Pendent jurisdiction is a doctrine of discretion: "Its justification lies in considerations of judicial economy, convenience and fairness to litigants. . . ." *Id.* at 726, 86 S.Ct. at 1139. Some of the factors to be considered are whether the federal claims were dismissed before trial, whether the state claims predominant, whether the state claims are closely tied to questions of federal policy, and whether the jury is likely to be confused by the treatment of divergent legal theories of relief. *Id.* at 726-27, 86 S.Ct. at 1139-40. Any specification that *Gibbs* required dismissal when all federal claims were eliminated before trial was soundly quieted in *Rosado* v. *Wyman*:

> We are not willing to defeat the commonsense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation—by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim. The Court has shunned this view.

397 U.S. 397, 405, 90 S.Ct. 1207, 1214, 25 L.Ed.2d 442 (1970) (footnotes and citations omitted).

[23] A review of the factors influencing discretion reveals that while the district court could have dismissed the state claim, it would not have been a clear abuse of discretion to refuse to do so after the final judgment. Certainly judicial economy would weigh against a third trial. Fairness to Carter, upon whom the International imposed federal jurisdiction, also militates for retention of pendent jurisdiction over the claim. Although the Court noted in *Gibbs* that it might even be appropriate to dismiss a pendent state claim after full trial, this case is not one in which the plaintiff was asking the

federal court to tolerate a purely state claim. 383 U.S. at 727, 86 S.Ct. at 1139. The district court could have properly decided to retain pendent jurisdiction over the state law case. *See Hudak* v. *Economic Research Analysts Inc.,* 499 F.2d 996, 1001 (5th Cir. 1974). Because the district court reluctantly concluded it had no jurisdiction, however, it never reached this question. We therefore return the case to the district court for consideration of whether, under all the surrounding circumstances, it should accept the state law claim under a discretionary exercise of pendent jurisdiction thus avoiding further duplicitous judicial efforts.

The writ is GRANTED. The case is returned to the district court with directions to VACATE the remand order, thereby allowing consideration of the pendent jurisdiction questions.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-7010

IN RE: BEN CARTER, *Petitioner.*

Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(August 13, 1980)

Before AINSWORTH, FAY and RANDALL, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

BEN CARTER, *Plaintiff,*

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, *Defendant.*

Civil Action No. CV-178-113

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE FOR A TRIAL

Defendant moves the court to set aside the verdict entered in the above entitled action on Tuesday, May 22, 1979, and the judgment entered thereon on Friday, May 25, 1979, and to enter judgment in favor of the Defendant in accordance with the motion for directed verdict made by the Defendant at the close of all the testimony herein, on the grounds, as stated in that motion that there was not sufficient evidence to permit the jury to draw an inference that the Defendant engaged in conduct so discriminatory or outrageous that no reasonable man in a civilized society should be expected to endure it by forming or jointing a conspiracy to cause the Plaintiff to suffer grievous emotional distress by way of embarrassment, scorn, and derision among his friends, associates, family, and fellow employees or to cause the Plaintiff any other injury, and on the following additional grounds: (1) the tort claim herein is preempted pursuant to the provisions of the National Labor Relations Act, as amended, 29 U.S.C. Sec 151 et seq. (2) the suit is barred by the applicable state statute of limitations, Ga. Code Ann. §3-1004, and (3) the court lacks jurisdiction over the subject matter of this non-federal claim because there is not complete diversity of citizenship between the Plaintiff and the Defendant [*Steelworkers* v. *Bouligny,* 382 US 145 (1975)].

In the alternative, Defendant moves the court to set aside the verdict and grant defendant a new trial on the following grounds:

1. The verdict is contrary to law.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is contrary to the evidence.
4. The verdict of the jury as to general damages is grossly excessive and unreasonable under the evidence.
5. The verdict as to general damages for subjecting Plaintiff to embarrassment, scorn and derision among his friends, associates, family and relatives and fellow employees in the sum of Thirty-Five Thousand Dollars ($35,000.00) is punitive in character and contrary to the court's rulings.
6. There was no evidence of impairment of Plaintiff's reputation among prospective employers by publication of false and defamatory statements with knowledge or reckless disregard of their falsity upon which the jury could predicate an award of actual or punitive damages.
7. The verdict as to punitive or exemplary damages in the sum of One Hundred Ten Thousand Dollars ($110,000.00) is so grossly excessive under the evidence as to evidence passion and prejudice against this labor union Defendant on the part of the jury.
8. This Honorable Court erred in its charge to the jury in the following respects:

   (a) In instructing the jury as to Georgia Code Section 54-801 entitled "Use of force or threats to prevent another from quitting or continuing employment" because the law requires that jurors not consider the fact of interference with employment opportunities on account of membership or non-membership in a labor organization in the tort action litigated herein.

(b) In instructing the jury as to Georgia Code Section 54-905 entitled "Unlawfulness of contracts requiring membership, in, or payments to, labor organizations as a condition of employment" because the law requires that jurors not consider the fact of interference with employment or employment opportunities on account of membership or nonmembership in a labor organization in the tort action litigated herein.

(c) In instructing the jury as to Georgia Code Section 54-904 entitled "Contracts requiring membership in, or payments to labor organizations as contrary to public policy" because the law requires that jurors not consider the fact of interference with employment opportunities on account of membership or non-membership in a labor organization as a condition of employment in the tort action litigated herein.

(d) In instructing the jury as to Georgia Code Section 54-801, 54-905, and 54-904 because the cumulative effect of those three instructions of provisions of the Georgia Right to Work Law necessarily induced the jury to consider the possible effect of interferences in connection with reaching a verdict as to compensatory and also as to punitive damages.

(e) In instructing the jury that it could consider discrimination by this Defendant with respect to Plaintiff's employment or employment opportunities if it found that the manner in which such discrimination was attempted was so discriminatory or outrageous that no reasonable man in a civilized society should be expected to endure it because such instruction is contrary to the evidence and the weight of the evidence and for the additional reason that such instruction is confusing and contradictory to the jury especial-

ly when considered in relation to the instructions given with respect to provisions of the Georgia Right to Work Law.

9. The verdict is contrary to law and the weight of the material and competent evidence, some of the reasons therefor being set forth as follows:

(a) The weight of the evidence established that there was no agreement, understanding, or concert of action between Defendant or any of its representatives and any other person or labor organization to deny or delay the reinstatement of Plaintiff to membership in Local Union No. 13. The only evidence on that issue is to the effect that the controversy over Plaintiff's reinstatement was viewed or considered by the Defendant as a matter to be resolved by and between Plaintiff and Local Union 13 in the exercise of its local autonomy.

(b) The weight of the evidence established, at most, that Plaintiff, a former union member on a withdrawal card, was denied reinstatement to union membership by Local Union 13 because Local Union 13 claimed that he owed the sum of Two Thousand Five Hundred Eighty Dollars ($2,580.00) in delinquent trust fund payments on behalf of certain fellow members of Local Union 13, that he requested that the Defendant intercede on his behalf in his dispute with Local Union 13, and that the Defendant refused to render the assistance he requested.

(c) The weight of the evidence established that the Defendant made no effort to conspire, communicate, or otherwise deal with any local union, employer, or person or knowingly to join with Local Union 13 or any other person or organization for the express or implied purpose

of inflicting on Plaintiff emotional distress or mental suffering by way of embarrassment, scorn, or derision among Plaintiff's friends, associates, and fellow employees. To the contrary, the weight of the evidence shows only that the Defendant refused or failed to intercede in Plaintiff's behalf, upon Plaintiff's request, in his dispute with Local Union 13 over his reinstatement to membership in the latter organization.

(d) The weight of the evidence does not establish any malice or bad faith on the part of the Defendant in its dealings with the Plaintiff or any intention on the part of Defendant or any of its agents to deny the benefits of union membership to Plaintiff for reasons of spite, hatred, ill will, dislike, animosity, or other like reason nor does the weight of the evidence establish any knowledge on the part of Defendant or any of its agents that Local Union 13 refused to reinstate Plaintiff to union membership for or because of any reason other than Plaintiff's refusal to pay his alleged debt in the amount of Two Thousand Five Hundred Eighty Dollars ($2,580.00) to Local Union 13 employees. The evidence of this issue shows at most a careless or inadequate investigation by this Defendant as to the validity of this debt and whether it was still outstanding.

(e) The weight of the evidence does not establish that Plaintiff suffered any actual mental anguish, tangible or intangible, or any similar type of ascertainable general or special damages as a consequence of any conduct on the part of the Defendant for which it is liable and, especially in a labor law context, an award of more than nominal damages for emotional

distress must be based on findings of actual injury. *Sota Segarra* v. *Sea-Land Service, Inc.*, 581 F 2d 291, 298-299 (1st Cir. 1978).

(f) The weight of the evidence does not establish that the Defendant's refusal or failure to intercede in his behalf in his dispute with Local Union 13 was wilful and malicious rather than merely arbitrary, i.e. unjustifiable, action. Mere failure or refusal by a labor organization to act or refusal by a labor organization to act on behalf of a member or employee does not amount to conduct of so aggrevated a nature that mental distress and punitive damages may be awarded. *Soto Segarra,* supra at 298.

(g) The true weight of the evidence clearly demonstrated that the reasons for the failure or refusal of the Defendant to intercede in the Plaintiff's behalf in his dispute with Local Union 13 over his reinstatement to membership in Local Union 13 were that the Defendant assumed, on the basis of representations made by Local Union 13, that Plaintiff was indebted to certain trust funds on behalf of several Local Union 13 employees at the time Plaintiff's application for reinstatement was pending, that the issue of the existence, discharge, or compromise of such indebtedness was felt by the Defendant to be a local matter concerning the Plaintiff and the Local Union 13, and, in view of the above factors, that it elected to advise the Plaintiff to resolve this matter with Local Union 13, without making an extensive investigation into the positions of the contesting parties as to the existence and amount of said indebtedness.

(h) It is contrary to reasonable inference and, therefore, the fair weight of the evidence that the Defendant initiated, or knowlingly or inten-

tionally joined, a conspiracy to inflict mental suffering or mental anguish upon Plaintiff or to subject him to embarrassment, scorn, or derision among his friends, associates, relatives and follow employees by denying him reinstatement to membership in Local Union 13.

10. The closing argument by the Plaintiff's counsel entitled the Defendant to a new trial for the following reasons:

(a) Counsel for Plaintiff improperly argued to the jury matters pertaining to employment or job discrimination on account of non-membership in a labor union, principally Local Union 85, affiliated with the Defendant, and that the Defendant was, therefore, liable to the Plaintiff for the consequences of such alleged interferences with the job oppoutunities.

(b) Counsel for Plaintiff improperly argued to the jury that the Defendant knew that the Plaintiff would be unable to obtain employment with union employers in right-to-work states such as Georgia and other states and was, therefore, liable for the consequences of all such violations of laws.

(c) Counsel for Plaintiff improperly argued to the jury that the Defendant has the burden at trial of proving that the Plaintiff in fact was indebted to several trust funds in the sum of Two Thousand Five Hundred Eighty Dollars ($2,580.00) on behalf of several members of Local Union 13 when, to the contrary, the burden of proof of said issues, as all issues, was upon the Plaintiff.

(d) Counsel for Plaintiff in making such improper arguments in the latter half of his presentation, at a time that the Defendant had no opportunity to respond thereto, violated the injunction of

the United States Supreme Court in tort cases of this nature to the effect that "the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself. "*Farmer* v. *Carpenters* 430 U.S. 290, 305.

(e) Counsel improperly argued to the jury that any sum awarded to the Plaintiff by the jury as punitive damages would be subject to federal income taxes and that, accordingly, a larger sum than might be warranted should be awarded to offset this tax liability. The court attempted to correct this argument but not until after the point had been emphasized by counsel.

(f) All of the foregoing statements made by Plaintiff's counsel were so prejudicial to the Defendant and unwarranted that no attempt by the court at the time to correct said statements could have prevented the erroneous beliefs that would have been implanted in the minds of the jurors by said improper statements, or any of them.

11. The court is obligated to set aside the verdict and direct a new trial herein or to require a remittor on the ground that it has a particular duty, in cases against labor organizations for actual and punitive damages for alleged outrageous torts committed to *assure* that the damages awarded are not excessive. The verdict of the jury herein is excessive in the light of the evidence herein where there was no proof that the Plaintiff suffered aggrevated mental and emotional damage or that any physical damage resulted from such alleged mental or emotional damage and no proof of punitive elements such as fraud, malice, ill will, or hostility on the part of the Defendant

towards the Plaintiff. The court is under an affirmative duty "if the amount of damages awarded is excessive,. . .to require a remittor or a new trial." *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 65-66 (1966).

12. The verdict of the jury awarding punitive damages is inconsistent with the rationale of the very recent holding of the United States Supreme Court in *International Brotherhood of Electrical Workers* v. *Foust* -US-No. 78-38, (May 29, 1979). In that case, which dealt with the propriety of awarding punitive damages against a labor union for breach of the duty of fair representation, the court (in a unanimous opinion) disallowed punitive damages "(b)ecause *general labor policy disfavors punishment* and the adverse consequences of punitive damage awards could be substantial. . ." (Emphasis ours.)

Justice Blackmun, in a concurring opinion, with which three Justices joined, stated that if punitive damages are ever to be awarded against labor unions they should be restricted "to their proper sphere, namely, to those rare cases where the union's conduct can truly be described as outrageous". At a later point in the concurring opinion, he said:

> "The union's conduct, in other words, was negligent or, at worst, grossly negligent. No court, to my knowledge, has ever held that negligence can form the basis for a proper punitive damages award. Especially should this be so in cases arising under the federal labor statutes."

There was no proof of any "actual injury" suffered by the Plaintiff, except as to loss of work opportunities at a higher wage rate, for which there could be no recovery of either actual or punitive damages, nor could be conduct of the Defendant herein be

characterized as "truly outrageous". The conduct of the Defendant herein was, perhaps, "negligent or, at worst, grossly negligent". Therefore, the award of punitive damages herein is contrary to federal labor policy and improper.

Defendant reserves the right to supplement or amplify the foregoing reasons for a new trial following receipt of a transcript of the record.

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June 4, 1979

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

BEN CARTER, *Plaintiff,*

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, *Defendant.*

Civil Action No. CV-178-113

SUGGESTION TO DISMISS ACTION PURSUANT TO RULE 12(h)(3)

Comes now the Defendant, Sheet Metal Workers International Association, AFL-CIO, an unincorporated association, and respectfully suggests to the court pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure that the judgment entered herein must be vacated and the complaint dismissed on the ground that the court lacks jurisdiction of the subject matter thereof and states as follows:

1. The Petition for Removal was filed by the moving Defendant, on or about June 14, 1978, at which time said Defendant believed that the Plaintiff was alleging inter alia a claim for breach of the duty of fair representation, which would have been within the jurisdiction of the federal court pursuant to 29 USC §185, 158, and/or 159, 28 USC §1337, and/or a claim under 29 USC §401 et seq (the Landrum Griffin Act).

2. However, by the time the case was ready for trial the pre-trial order was prepared, and it became clear that the subject matter in issue was solely and exclusively a non-federal tort claim arising under the laws of the State of Georgia, to wit a conspiracy to cause injury to an individual. The claim litigated was viewed and treated by the court as non-federal, and the court so advised the parties and the jury.

3. Insofar as the non-federal conspiracy claim is concerned, it could only be litigated in the federal courts if the jurisdictional requirements of 28 USC §1332 were met, to wit: the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs and the action is one between citizens of different states. The non-federal action herein is fatally defective in that it is not between citizens of different states.

4. The rule as to citizenship of an unincorporated association such as the Defendant is that "an unincorporated association's citizenship is that of each of its members". *United Steelworkers* v. *Bouligny,* 382 US 145, 146-147 (1965). The record demonstrates that the Defendant herein is an unincorporated international labor organization with approximately 150,000 members in all 50 states of the United States of America and a substantial membership in Canada. The Defendant has members in the State of Georgia, including Ben Carter himself, the Plaintiff herein.

5. The issue of lack of federal jurisdiction may be raised by any party at any time even after trial has occurred, and the said issue may be raised as well by the trial or an appellate court *sua sponte.* As stated in 1, Moore's Federal Practice (2d Ed. 1978) Paragraph 0.60[4], p.p. 624-626:

> "The Bankruptcy Act validly authorizes a defendant to consent to a plenary action brought in a federal court by the bankrupcy receiver or trustee. Apart from some such valid authorization, the mere consent of parties cannot confer jurisdiction upon a federal court, nor can any estoppel be utilized to endow a federal court with a jurisdiction it does not possess. And even a party who invoked the federal court's jurisdiction is not estoppel to raise lack of federal jurisdiction after a trial on the merits."

For the reasons given, the Defendant submits that its suggestion is well taken and the complaint herein should and must be dismissed pursuant to Rule 12(h)(3), and remanded to the Superior Court of Richmond County, Georgia for appropriate proceedings thereon.

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June 4, 1979

Supreme Court, U. S.
FILED
DEC 8 1980
MICHAEL RODAK, JR., CLERK

No. 80-733

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,
Petitioner,

v.

BEN CARTER, *Respondent.*

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

The Court of Appeals has not decided an important federal question in a way in conflict with applicable decisions of this Court.

Respondent prays that this Court deny the petition for writ of certiorari to review the writ of mandamus granted by a panel of the United States Court of Appeals for the Fifth Circuit in the above entitled case on May 30, 1980.

ARGUMENT

Petitioner seeks to invoke the review powers of this Court pursuant to Rule 19 of the United States Supreme Court Rules, wherein it maintains the Court of Appeals decided an important federal question in a way in conflict with the applicable decisions of this Court. Rule 19(1)(b), Supreme Court Rules.

Petitioner cites four decisions of this Court wherein it maintains the decision of the Court of Appeals is in conflict with decisions of this Court. *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966); *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U.S. 336 (1976); *Gravitt* v. *Southwestern Bell Telephone Co.,* 430 U.S. 723 (1977); *Browder* v. *Department of Corrections of Illinois,* 434 U.S. 257, 266 (1978). A careful reading of these cases clearly indicates there is no conflict with the decision of the Court of Appeals.

The Court of Appeals correctly followed the doctrine of *Gibbs, supra,* in that the Court of Appeals remanded this case to the District Court for the exercise of judicial discretion which the District Court had failed to exercise.

There is no conflict with the *Thermtron Products* case, *supra. Thermtron* is authority for respondent's position in that the remand was improper and without authority under 28 USC 1447(c) and 28 USC 1447(d).

In *Gravitt, supra,* the remand occurred prior to any final verdict or judgment. Respondent obtained a favorable ruling in a court with jurisdiction and the reversal of such a decision would raise serious questions regarding the review of his favorable verdict. To rule otherwise would encroach upon respondent's rights in that he would be denied a "due process property right" under the Fifth Amendment to the United States Constitution.

The case of *Browder* v. *Department of Corrections of Illinois, supra,* is likewise inapposite. There is no time specified in the statutes or in the applicable court rules within which a party may seek review of an order by way of "writ of prohibition and/or mandamus". Respondent is not bound to seek review in such a manner as petitioner would have him. Respondent has the right to seek review by any means available. This is what respondent elected to do and the review procedure he followed was approved by the Court of Appeals.

In its decision, the Court of Appeals interpreted the words "final judgment" when used in conjunction with 28 USC 1447(c) and 28 USC 1447(d). The Court of Appeals held no remand was proper after final judgment was read in connection with these statutes.

Petitioner removed the case from State Court to Federal Court on federal grounds and it additionally stipulated in the pre-trial order that jurisdiction was founded on diversity of citizenship. The Court of Appeals determined that the trial judge erred in its definition of "final judgment" and additionally in its conclusion that it was without jurisdiction. The Court of Appeals determined that the trial court had no au-

thority to remand the case to State Court after respondent had secured a favorable verdict.

The trial judge had clearly erred on the issue of jurisdiction, as well as the definition of "final judgment". Petitioner has no standing to invoke the rule of *Owen Equipment Erection Co.* v. *Kroger,* 437 U.S. 365. In *Kroger,* there was no jurisdiction. Here, there was jurisdiction throughout the entire proceedings. In *Kroger,* the claimant's successful verdict was defeated after judgment because there was no jurisdiction. In *Kroger,* the Court held that the constitutional mandates regarding jurisdiction took precedence even after final judgment and the doctrine of estoppel would not apply. Here the Court has been vested with jurisdiction throughout these proceedings and respondent, notwithstanding the above, should not be precluded from an assertion of an estoppel defense, among other defenses, to the claim of petitioner who seeks in a circuitous manner to void an otherwise valid judgment.

CONCLUSION

The Court of Appeals has not decided an important federal question in a way in conflict with the applicable decisions of this Court. The petition for writ of certiorari should be denied.

Respectfully submitted,

HARRIS, MCCRACKEN & JACKSON

By: /s/ WILLIAM R. MCCRACKEN
WILLIAM R. MCCRACKEN